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Supreme Court of the United States

October Term, 1956

No. 107

KINGSLEY BOOKS, INC., LOUIS FINKELSTEIN, doing business as TIMES BOOK SHOP and MARTIN KLEINBERG,

Appellants,

—v.—

PETER CAMPBELL BROWN, CORPORATION COUNSEL OF THE CITY OF NEW YORK,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

SUPPLEMENTAL BRIEF OF APPELLANTS

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SUPPLEMENTAL BRIEF OF APPELLANTS

At the argument certain points were raised, which for lack of available time for oral argument were not comprehensively treated. This supplemental brief proposes to tie together some of the argument.

(1)

So far as suppression is concerned there is no difference between suppressing the publishing of a book or suppressing its distribution.

The point to be remembered is that suppression is directed against an *existing* book. The problem would be akin to a species of suppression more familiar to the Court in recent years, *i.e.*, the suppression of a motion picture by a governmental agency, by forbidding its *distribution*.

That the protection of distribution is on a par with the protection of publication has been well-articulated by this Court in a number of cases, prominent among them being *Lovell* v. *Griffin*, 303 U. S. 444.

Were this a novel proposition to be demonstrated, then the following would be pertinent:

Censorship is impossible against an *idea* that resides only in the mind of the author. Only after his ideas are uttered, or in manuscript can suppression function. In the case of a book suppression can start with the manuscript. It can be suppressed at every other stage, such as at the typesetting, at the printing, at the binding, or at the storage stage for sale and distribution.

The statute in question deals with the storage stage, where a person possesses or is about to acquire possession for the purpose of sale or distribution. Wherein lies the difference between suppression at the printing or publication stage from that of keeping the book ready for sale or distribution? The answer must be that there is no difference. Suppression means prevention of its utterance to the world and this can be done at any stage.

So too, is there no difference between possession by a printer or publisher for the purpose of sale and that of possession for a like purpose by a dealer. The statute makes *no* distinction. Nor can there be any. The dealer is merely a conduit for the utterance. The printer or publisher could eliminate the dealer and make distribution himself to the public. He would thus fall under the strictures of the statute. Both statute and reason, therefore, make no distinction between a "publisher" or a "dealer".

Suppression therefore may follow from the inception of the utterance of the author's ideas to the time of sale. Sales themselves may be evidentiary of the fact that the books were available for the purpose of sale.

(2)

There is no distinction in principle between suppression of existing or future publications.

Here again, it is the fact of suppression of a publication that is all-important. Appellants are not concerned with the aspect of the *Near* case which was disciplinary in character, in that *Near* was forbidden to publish in the future because he had offended in the past. Appellants are only concerned with the aspect of censorship in *Near* as to *existing* publications and which was subsequently the basis of decision in the numerous cases that found support in *Near*, such as the cases cited in "Brief of Appellants" pages 18-25.

What is important is that an existing publication, like the familiar existing motion picture is being deprived of circulation by governmental fiat. This, we have argued the First Amendment forbids.

While on the subject of suppression the Court's attention should be directed to the existence of a concession by appellee in his brief (top of page 7) that the order to show cause that instituted the application for a temporary injunction contained a stay, which restrained appellants from distributing or selling, or acquiring for the purpose of sale, the publications in this case. This concession is noted because the papers seeking the temporary injunction were not incorporated in the record (R. 39).

(3)

English cases do not explain or control the First Amendment.

In the cases submitted in "Brief of Appellants", page 12, it will be found that the First Amendment was enacted for the very purpose of overcoming what was deemed abuses of English laws in the field of expression.

Therefore, though our debt to the common law is great, our Constitution nevertheless, indicates a break in the field of free speech. It follows that *Regina* v. *Hicklin*, 3 Q. B. 360 is not an authority or even a guide to decision here. That case has been repudiated even as a common law signpost. (*Halsey* v. *New York Society for the Suppression of Vice*, 234 N. Y. 1; *United States* v. *Kennerley*, 209 Fed. 119.)

Since the First Amendment controls over English practices, that case cannot be considered as an authority paramount over our own constitutional traditions.

(4)

No judicial safeguards are involved in a case of suppression.

At the argument, Mr. Justice Frankfurter indicated that judicial safeguards distinguished suppression by a judge from suppression by an administrative official.

But there are no judicial safeguards involved here. A book is placed in evidence and judge decides whether it offends the statute. The administrative official examines the book in evidence and makes a determination whether it offends the statute. Where are the necessary constitutional safeguards? In which way is the judge more qualified than the administrative official?

Of course, there may be a right of appeal from an administrative determination. So may there be an appeal from a judge. But this does not add any distinction. See, *Cantwell* case, cited page 34, "Brief of Appellant."

The answer, in short, is that *Near* decided that suppression by the judiciary was as repugnant to the Constitution as suppression by an administrative official. The *Near* case has been followed with increasing respect over the years, and it has become a landmark in the field of freedom of speech. What was there decided cannot be lightly ignored at this time.

The distinction recognized by this Court between a hearing and determination by an administrative officer and that by a court was remarked by Mr. Justice Frankfurter. But those cases do not deal with freedom of expression. The *Near* case implicitly makes that clear.

(5)

The legislature may not provide for suppression where the Constitution forbids.

At the argument, Mr. Justice Frankfurter with a glance at *Beauharnais* suggested that the legislature may step in to resolve the mischief that may be created by speech that may influence persons.

This was remarked in connection with counsel's argument that the libels against a race in *Near* which this Court denied suppression by injunction could be equated as an evil with obscenity, and therefore both cases are on a par, in that respect.

But the Minnesota legislature had undertaken to suppress what it thought the Constitution permitted. Yet this

lants argument solely on "prior restraint" we necessarily assume the books to be as characterized.

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Respectfully submitted,

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